

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

TURNER FRIERSON, JR. and
PINKIE MAE FRIERSON,

Plaintiffs,

v.

No.4:98CV105

WAL-MART STORES, INC.,
CLIFF BURNS, DAWN GRAY,
DONNA ICE, and SHAWN CLASEMAN,

Defendants.

OPINION

Presently before the court is the plaintiffs' motion to remand this cause of action to the Circuit Court of Sunflower County, Mississippi. For the reasons stated below, this court finds that the motion is well taken.

A slip and fall occurred in the Indianola Wal-Mart store on August 30, 1996. The slippee, Turner Frierson, Jr., brought suit in state court on March 25, 1998 against Wal-Mart and four of its employees. The defendants removed the cause of action to this court on May 8, 1998 alleging fraudulent joinder.

No law need be cited for the fact that diversity jurisdiction, the alleged basis of subject matter jurisdiction in the removal petition, requires complete diversity between the plaintiffs and defendants. No plaintiff may be a domiciliary of the same state as any defendant. Once a case has been removed, the removing party bears the burden of proving that the court has jurisdiction to hear the claim. *Jernigan v. Ashland Oil, Inc.*, 989 F.2d 812, 815 (5th Cir.), *cert. denied*, 510 U.S. 868

(1993). "The removing party must prove that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court, or that there has been outright fraud in the plaintiff's pleading of jurisdictional facts." *Green v. Amerada Hess Corp.*, 707 F.2d 201, 205 (5th Cir.1983), *cert. denied*, 464 U.S. 1039 (1984). The factual allegations in the plaintiffs' state court pleadings must be evaluated in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of the plaintiff. *Id.* "Fraudulent joinder claims can be resolved by 'piercing the pleadings' and considering summary judgment-type evidence such as affidavits and deposition testimony." *Cavallini v. State Farm Ins.*, 44 F.3d 256, 263 (5th Cir. 1995); *Ford v. Elsbury*, 32 F.3d 931, 935 (5th Cir.1994); *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir.), *cert. denied*, 498 U.S. 817 (1990).

In opposition to the plaintiffs' motion for remand, Wal-Mart submits affidavits of the four employees. The affidavits of Cliff Burns and Donna Ice, both of whom are Mississippi residents, reveal that neither person was employed at the Wal-Mart store in Indianola on August 30, 1996, the date of the accident. Shawn Claseman attests that he was the store manager on August 30, 1996; however, in March of 1997, he became a citizen of Alabama and currently resides there. Because diversity of citizenship, for purposes of removal, must exist both at the time of filing in state court and at the time of removal to federal court, *Coury v. Prot*, 85 F.3d 244, 249 (5th Cir. 1996), the defendants have met their burden of establishing diversity in regard to Claseman. Claseman was a citizen of Alabama when the state court action was filed and when it was removed.

In her affidavit, Dawn Gray admits that she was an assistant manager at the Indianola Wal-Mart store on the date of the accident and that subsequently she was transferred to Jackson, Mississippi. She further states:

I left the Jackson, Mississippi store in March, 1998 and took a position as an assistant manager for the Wal-Mart Store in Hiram, Georgia. I have been a Georgia resident since that time.

Because Gray does not specify the date on which she changed citizenship and because the state court cause of action was filed on March 25, 1998, this court must resolve this issue of substantive fact in favor of the plaintiff. The defendants have not met their burden. Diversity of citizenship does not exist. Therefore, this court finds that the motion must be granted. "The burden of proving a fraudulent joinder is a heavy one." *Green v. Amerada Hess*, 707 F.2d at 205.

An appropriate order shall be issued.

This the _____ day of June, 1998.

CHIEF JUDGE